UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and CASE 07–CA–232299

CENTRAL MICHIGAN AREA LOCAL 300,
AMERICAN POSTAL WORKERS UNION
(APWU), AFL–CIO

Eric S. Cockrell, Esq.,
for the General Counsel.

Roderick D. Eves, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 29, 2019. Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO, the Charging Party (the Union) filed the charge against the United States Postal Service (USPS) (Respondent) on December 6, 2018. The General Counsel issued the complaint on March 29, 2019, alleging that Respondent unreasonably delayed in furnishing the Union with requested information, necessary and relevant to the Union's representational duties, from November 29, 2018 until January 10, 2019, in violation of Section 8(a)(5) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates various facilities throughout the United States in performing its duties, including its facility in Eaton Rapids, Michigan. The Board has jurisdiction over Respondent and this case by virtue of Section 1209 of the Postal Reorganization Act (PRA).

At all material times, the APWU (national union) and the Local 300 have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relationship Between Respondent and the Union

At all relevant times, the individuals below held the positions set forth opposite their names. Respondent has admitted and I find that they have been supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act:

Timothy Schuchaskie -	Postmaster
Kathy Strahan -	Acting Supervisor
Chad Rodriguez -	Supervisor Customer Service

The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

Since about July 20, 1971, Respondent has recognized the National Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 21, 2015 through September 20, 2018. Negotiations for a successor contract is pending arbitration. (Tr. 30.) Since July 20, 1971, the National Union has been the exclusive collective-bargaining representative of the unit pursuant to Section 9(a) of the Act.

At all material times, the Charging Party has been the designated servicing agent of the National Union for the employees in the unit employed at many of Respondent's facilities located in Central Michigan. (GC Exh. 1(c), par. 5). John Greathouse is the Union's Central Michigan Area Local 300 steward representing over 200 members, including those unit members in the Eaton Rapids, Michigan Post Office (facility) involved in this case. In his position, he investigates complaints, requests information, and if they have merit, files grievances. He is also employed as a distribution clerk at the Lansing, Michigan processing and distribution center.

The collective-bargaining agreement (CBA) referred to above includes several articles that the parties either questioned witnesses about and/or relied upon to support their positions and/or are otherwise relevant to this case. (Jt. Exh. 2.) They are as follows:

> The steward, chief steward or other Union representative properly certified in accordance with Section 2 above [regarding "Appointment of Stewards"] may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or

> determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

Art. 17, Sec. 3, par. 2; "The Union may designate in writing to the Employer one Union officer. . . to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance." Art. 17, Sec. 2(B);

> The Employer will make available for inspection by the Union all relevant information necessary for collective-bargaining or enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information[. . .]

Art. 31, sec. 3, par. 1; "Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee." Art. 31, Sec. 3, par. 2; and "The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required." Art. 15, Sec. 2 (a).[1]

B. Background

This case arises from a disciplinary action taken by Respondent against unit member and part-time flexible clerk, Charlotte Barker (Barker) at the Eaton Rapids, Michigan facility. The disciplinary action is not at issue here, only the related information request. Supervisor Kathy Strahan (Strahan) submitted an administrative action request, dated December 4, 2018, and signed on December 7, 2018, by Strahan and concurring official, Schuchaskie.[2] recommending Barker's removal. Strahan based her request for action on Barker's alleged failure to report to work as scheduled on November 20 and 27, resulting in absences without leave (AWOL) "LATE" charges. (Jt. Exh. 3.) Supportive documentation included, but was not limited to, notification of absence forms signed by Strahan and dated November 20 and 27, Barker's leave analysis form, and Respondent's notes from investigative interviews of Barker and Postmaster Schuchaskie. The leave analysis form contained handwritten comments, signed and dated by Strahan on November 30, regarding Barker's AWOL charges. (See Jt. Exh. 3, pp 10–13). It also named several witnesses to the November 27 incident, including Strahan, Supervisor Rodriguez, Schuchaskie and one other employees. (Id.) These documents also referenced past discipline issued to Barker and considered by management and notification of her mandatory investigative interview on December 4. (Jt. Exh. 3.)

On December 4, at 8:30 a.m., Respondent conducted the investigatory interview with Barker, with Greathouse present as her representative. Schuchaskie was interviewed on December 7. (Jt. Exh. 3, pp. 16–18). On December 11, Respondent through Strahan and

[1] Although negotiations for a successor contract are pending arbitration, both Respondent and the General Counsel referenced and relied upon all or most of these provisions in the expired contract.

[2] All dates are in 2018 unless otherwise indicated.

postmaster Schuchaskie mailed a notice of removal to Barker for failing to report to work as assigned on November 20 and 27. This notice reflected Respondent's consideration of Barker's past disciplinary record including a letter of warning and 14-day suspension in 2017 and a long-term suspension in September 2018. (Jt. Exh. 3, pp. 19–-22.) It is undisputed that Barker received the notice on December 13. (Tr. 107). It is also undisputed that Barker did not contact the Union when she received this notice.

C. *The Union's Request for Information and Respondent's Actions*

1. Union's request and Respondent's response

On November 28, Strahan called Greathouse to notify him about Barker's December 4 interview concerning the AWOL charges. (Tr. 44.) Therefore, on November 29, 2018, Greathouse, on behalf of the Union, requested by email to Schuchaskie that Respondent provide the Union with "copies of all records and documents including questions to get used in the interview," prior to Barker's investigative interview. (Jt. Exh. 2.)

On November 30, Schuchaskie emailed labor relations specialist Patricia Schaefer (Schaefer) requesting guidance on how to respond to the Union's request for information. He stated that "I have never had a request like this. The paperwork hasn't been finalized because the interview isn't done." Schaefer in turn emailed to "GMD LABOR RELATIONS," stating that

> This is a great big bunch of bulls**t . . . How can they ask for information when no discipline has been issued and there is nothing to grieve since we haven't done the II [investigatory interview]. The people doing the interview don't know what questions may come about at the II depending on the answers . . .[h]ave any of you ran across this?

(R. Exh. 2.) In response, Susan Harcus-Zumberg (Harcus), Respondent's manager, labor relations, wrote:

> Cart before the horse. They are not entitled to pre-decisional information. This is an investigatory interview and if we take action then they can have a [sic] copies.
>
> The logic is this. No decision has been made so there is no basis for the Union to have access as there is no basis for a grievance. Information is just that until it is used for a basis or support of a decision. Investigatory interview are [sic] just that a part of a process to make a decision.

(Id.) On December 3, Schuchaskie responded to Greathouse with part of the same language used by Harcus: "Cart before the horse. This is an investigatory interview and if we take action then you can have copies. The logic is this. Information is just that until it is used for a basis or support of a decision. Investigatory interview is just a part of the process to make a decision." (Jt. Exh. 2; R. Exh. 2.) In other words, Respondent believed the entire request was premature. (Tr. 93–94.)

On December 6, Greathouse filed an unfair labor practice charge alleging that Respondent had failed to provide information in a timely manner.[3] (GC Exh. 1(a)-(b).) Greathouse testified that he orally renewed the Union's information request on December 27 or 28, during a Step 1 meeting related to another case, when he questioned both Strahan and Rodriguez about the status of the information request. They did not know the status. (Tr. 38–41.) He did not communicate a renewed request to Schuchaskie or anyone else. Schuchaskie acknowledged the Union's initial written request, but denied that Strahan or Rodriguez informed him of an oral request. (Tr. 66.)

However, Greathouse did not learn that Respondent had issued Barker the December 11 removal notice for AWOL until a January 4, 2019 meeting with Schaefer on another matter. Schaefer confirmed, and it has not been disputed, that he was "totally shocked" to find out that Barker received the notice, and that Greathouse "said something about Charlie [Barker] hasn't notified me, or Charlie, it would have been nice if she'd have told me." (Tr. 33, 62–63, 113–114.) Greathouse testified that Barker had notified him about another removal notice that she received on December 6, putting her on administrative leave for failing to follow instructions. When he questioned Barker about the December 11 removal, after his January 4 meeting with Schaefer, Barker responded that "[s]he did receive it [the removal notice] on December 13," but upon opening it, she "thought it was a copy of the original notice of removal that she had received on December 6th, and literally just took it, threw it on her desk, and didn't think anything of it." (Tr. 62–-63, 65–67.) Prior to that, Greathouse had not previously asked Barker if Respondent had advised her of a decision regarding the AWOL charges.[4] (Tr. 66.)

On January 10, 2019, Schuchaskie provided Greathouse with the requested documentation and emailed him that "I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." (Tr. 45–47; Jt. Exh. 3.) Schuchaskie testified that he had not provided the requested documentation to the Union earlier or after Respondent issued Barker the notice of removal because he expected the Union to make another request. However, in his December 3 response, he did not specifically ask, or tell, Greathouse to renew the request, but rather vaguely stated, "Cart before the horse. This is an investigatory interview and if we take action then you can have copies." (Jt. Exh. 2.) Schuchaskie then testified that Harcus had instructed him to send the information on January 10, 2019, because the Union had filed a "labor charge for lack of all the information." (Tr. 93–94.)

[3] This charge also included a violation of *Weingarten* rights claim, which was subsequently dismissed. Greathouse testified and indicated in the charge that he had filed a grievance on the same date, December 6, "for the failure to provide information in a timely manner." (Tr. 61–62; GC Exh. 1(a).) However, a copy of that grievance was not introduced into evidence.

[4] A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above. That said, I credit Greathouse's testimony regarding his subsequent conversation with Barber about her receipt of the removal notices. It was straightforward, he was truthful and sincere about his discovery on January 4 of the second notice, and his testimony was not disputed.

The information furnished included the administrative action request, with all of the documents previously mentioned. (Tr. 45–50; 51, 93–94; Jt. Exh. 3.)

2. Greathouse's explanation for the information request

Greathouse acknowledged that going into the interview, he knew that Barker had been charged with AWOL, but explained that he needed the requested information "to have a greater understanding as to what the agency was charging her [Barker] with and to be able to counsel the grievant prior to the investigative interview." (Tr. 45, 65.) Although he admitted that Respondent does not normally notify the Union when an employee receives discipline, and that Barker had not notified him when she received the notice, Greathouse believed that Respondent's failure to furnish the requested documentation in a timely manner resulted in Barker's removal and the Union's inability to timely grieve it.[5] (Tr. 58–61, 67.)

Greathouse pointed out that Barker's notices of absence to request leave were dated and signed by Strahan on November 20 and 27, 2018, and leave analysis dated November 30, with Strahan's comments, were completed prior to December 4. (Jt. Exh. 3, pp. 12–15.) Greathouse conceded that interview questions may not have been created prior to December 4, but that Respondent did not convey this to him. (Tr. 76.) Other than Schuchaskie's statement on January 10, 2019, that he was "waiting for an info request after this [the removal notice] was issued," and had not received a grievance on the removal, Respondent did not provide a reason for the continued delay after the investigatory interview took place or after discipline issued. (Tr. 50–51.) Nor did Respondent ask that the information request be clarified or narrowed to exclude documents/information not yet in existence.

Greathouse insisted that Respondent had previously furnished the same or similar documentation in about five or six other cases right after the investigative interview and in approximately two cases, prior to the interview. When asked for details, he testified that Respondent had furnished him with an inspector general (OIG) report and other documents relating to a removal in the Holt Post Office the day before the interview. (Tr. 56–58, 77–78.)

3. Respondent's justification for the delay

As previously stated, Schuchaskie testified that he delayed in the issuance of Barber's removal notice because he expected the Union to make another request for information after discipline was issued. (Tr. 89.) He recalled seeing Greathouse at the facility on December 27 when Greathouse attended a meeting to interview Strahan and Rodriguez regarding another matter; however, Greathouse never asked him about the status of the information request.[6]

[5] As previously stated, CBA Art. 15, Sec. 2 (a) instructed that "The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance."

[6] Greathouse did not believe that Schuchaskie was at the facility when he met with Strahan and Rodriguez on December 27 because "[h]is van was not there." (Tr. 68.) Contrary to Respondent's implication that Greathouse did not tell the truth about asking Strahan or Rodriguez about the status of the information request, I credit Greathouse's testimony on this point. Respondent did not call either Strahan or Rodriguez to rebut Greathouse's testimony and Greathouse was forthright in his testimony that he never sought to renew the request for information with Schuchaskie. Further, Schuchaskie admitted, after initially testifying that he was at the facility the entire day, that it was possible that he may have stepped out for a period of time. (Tr. 97–98.)

Schuchaskie indicted that pursuant to the CBA, Greathouse should have directed all inquiries about the pending information request to him. (Tr. 86, 91–92, 97–98, 100.)

Schuchaskie acknowledged that Respondent had provided information in connection with the Union's information request in another of Barker's cases within a few days but explained that that request was for medical documentation only and not associated with an investigative interview. However, when asked if there was an investigative interview conducted in that other case, Schuchaskie could not recall. (Tr. 99–102.)

Labor Relations Specialist Schaefer confirmed that a grievance on Barker's removal notice filed after Greathouse learned about it on January 4, 2019 would have been untimely because it had not been filed within the 14-day period after Barker received it. (Tr. 107.) She admitted that some underlying documents existed in this case prior to the investigative interview, but that it did not mean that "all the questions are written or all the evidence is put together yet." (Tr. 118.) Although Schaefer insisted that Respondent had no duty to furnish any information before a disciplinary decision had been made, Respondent continued to delay in furnishing it once it issued Barker's December 11 removal notice.

III. LEGAL STANDARDS AND ANALYSIS

A. The Requested Information is Presumptively Relevant

Pursuant to Section 8(a)(5) and (d) of the Act, an employer must provide a requesting union with information that is necessary and relevant for the performance of its duties. *NLRB v. Truitt Mfg. Co*. 351 U.S. 149, 153 (1956); *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp*., 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co*., 344 NLRB 231, 235 (2005). "[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 436 (1967). This includes information necessary "not only for collective bargaining but for grievance adjustment and contract administration." *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689, 692 (2014), citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005). Therefore, the Board has established that information requested regarding bargaining unit employees, and especially the filing, possible filing or processing of grievances is presumptively relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994); *Contract Flooring Systems*, 344 NLRB 925, 928 (2005); *T.U. Electric*,306 NLRB 654, 656 (1992); *Ohio Power Co.*, 216 NLRB 987, 991–992 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).[7]

[7] A pending grievance is not a prerequisite for requested information to be considered relevant to a union's statutory responsibilities. Indeed, the union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter. See *Public Service Co. of New Mexico*, 360 N at 574, citing *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (information presumptively relevant to union's statutory duty to represent unit employee "in any possible future dispute with the Respondent over the retained information"); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 fn. 7 (2000), enfd. on other grounds 263 F.3d 345 (4th Cir. 2001) (the union may retain information relevant for potential future use for its performance of its representational duties).

The burden to establish relevance in information requests is not a heavy one, and potential or probable relevance will sufficiently invoke an employer's obligation to provide information. The Board uses a broad, discovery-type standard, requiring only that the union demonstrate "more than a mere suspicion of the matter for which the information is sought." *Racetrack Food Services*, 353 NLRB 687, 699 (2008) (citation omitted), reaffd. 355 NLRB 1258, 1258 (2010); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993).

I find that the record supports a finding that the information requested by the Union as the exclusive representative of the unit and pertaining to discipline and a potential grievance concerning Barker's time and attendance and other terms and conditions of her employment was presumptively relevant. The Union in representing its member employee needed information prior to the investigative interview to effectively understand the charges levied against her, counsel her and prepare to represent her. There is no evidence to doubt the Union's reasonable and good-faith belief that an investigative interview would result in further discipline of Barker.

In those instances where information pertaining to employees in the bargaining unit is presumptively relevant, as in this case, the employer has the burden of rebutting that presumption. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *AK Steel Corp*., 324 NLRB 173, 183 (1997). The evidence shows that in this case, Respondent has not done so.

B. Respondent's Confidentiality Defense Fails

1. General

Respondent has not really challenged the relevancy of the Union's requested information. Rather, Respondent argues that the request was premature, and it was not legally obligated to provide any of the requested information prior to the completion of its disciplinary investigation much less prior to the interview. Respondent grounds its contention in an assertion of confidentiality, first proffered during the trial. In its brief, Respondent argues that its legitimate interest in maintaining confidentiality of the documents requested prior to issuance of Barker's notice of removal outweighed the Union's need for the information. Further, Respondent indirectly contends that the Union failed to accept and/or fully participate in Respondent's offer to accommodate by reasserting the request once it completed the investigation and issued the removal notice to Barker.

Where, as here, an employer raises confidentiality concerns, generally the employer has the burden of establishing a legitimate claim of confidentiality that would justify refusal to provide the requested information. *Medstar Washington Hospital Center*, 360 NLRB 846, 846, fn. 1 (2014), citing, *NLRB v. Detroit Edison*, 440 U.S. 301 (1979). To determine whether an employer has established its claim, the Board has applied the balancing test set forth in *Detroit Edison v. NLRB,* 440 U.S. 301 (1979). See also, *American Baptist Homes of the West,* 362 NLRB 1135 (2015), enfd. in relevant part 858 F.3d 612 (D.C. Cir. 2017) (Board indicated it would apply *Detroit Edison* test in future cases when an employer asserts a confidentiality interest in protecting witness statements). Under *Detroit Edison*, the Board balanced the Union's need for requested relevant information against the employer's established legitimate and

substantial confidentially interests. 362 NLRB at 1139. In establishing such an interest, an employer must demonstrate more than a generalized concern about protecting the integrity of employee disciplinary investigations. Id. Instead, an employer must determine in each case whether any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a coverup. Id. citing *Hyundai America Shipping Agency,* 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309, 314 (D.C. Cir. 2015). If a legitimate and substantial confidentiality interest is established, the employer must offer to accommodate both its concern and its bargaining obligation, "as is often done by making an offer to release the information conditionally or by placing restrictions on [its] use . . . . [T]he onus is on the employer because it is in the better position to propose how best it can respond to a union request for information." See also *Metropolitan Edison Co.*, 330 NLRB 107, 107-108 (1999). The union need not propose the precise alternative/accommodation. *U.S. Testing Co. v.* 45 *NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998).

Here, there is no evidence that witnesses needed protection, evidence was in danger of being destroyed, testimony might be fabricated or there was a need to prevent a coverup. Instead, Respondent had accused Barker of violating its attendance rules and policies by being late, without approved leave, on more than one occasion. Respondent also considered her prior discipline, but there is no evidence that Greathouse or Barker knew what past discipline would be used or how far back Respondent would reach. In addition, it appears that the only witness interviewed was Postmaster Schuchaskie who showed no signs of being concerned about witness intimidation. Others noted to have been witnesses included Rodriguez, Strahan, and a clerk, but there is no evidence that they (other than Strahan) provided statements. Nor were they presented to testify. (Jt. Exhs, pp. 4, 15, 18). It is highly unlikely that sharing more details about the nature of the charges involved in this case would have resulted in witness intimidation or tampering or would have otherwise disrupted the investigation in any way. This case is distinguished from cases in which the employer's confidentiality interest outweighed the union's or employee's need. It was not related to any physical altercation or any safety matters or illegal activity such as drug use or theft. See, e.g., *Climax Molybdenum Co. v. NLRB,* 584 F.2d 360, 362–364 (10th Cir. 1978) (investigation of a mining safety incident involving a physical altercation between employees created a special set of facts such that the employer had a substantial and legitimate confidentiality interest.)

Although interview questions had not been drafted, the evidence shows that other related documents either were or came into existence prior to the interview, e.g., the AWOL notices dated and signed by Strahan on November 20 and 27, 2018, and the leave analysis review prepared and signed by Strahan on November 30. (Jt. Exh. 3, pp. 12–15). Therefore, I find that Respondent had an obligation to provide the Union with available information regarding the charges against Barker prior to the investigative interview. In the event that the Board finds that Respondent's proffered confidentiality interest outweighs the Union's need, Respondent may not simply refuse to provide the information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. *American Baptist Homes of the West,* 362 35 NLRB at 1137. I find that Respondent did not propose a sufficient accommodation in this case. I reject Respondent's argument that it did so on December 3 with Schuchaskie's response that "if we take action then you can have copies." This was not a reasonable accommodation, but a refusal to provide any information at all until and unless Respondent took disciplinary action against Barker.

Nevertheless, any alleged accommodation defense is negated by Respondent's failure to make good on its offer. Once it completed the interview on December 4 and issued Barker's removal notice on December 11, Respondent waited another month, without sufficient justification or explanation, before it furnished the Union with the requested documents. Schuchaskie first testified that he had been waiting until the Union reinstated its request following issuance of the removal notice; however, as determined, his December 3 response to Greathouse did not reflect this intent. Nor did it put Greathouse "on notice" that the investigative interview and ongoing investigation "could be compromised if information [was] revealed too soon." (R. Br. at 9.) Assuming the Union had an obligation to reinstate its request (which it did not), the Union's December 6 charge in this case should have alerted Respondent that the Union had not waived or otherwise abandoned the request. Instead, Schuchaskie continued to withhold the information promised until January 10, 2019, when Harcus instructed him to release it.

C. Respondent's Weingarten Defense Fails

Respondent further argues that the Supreme Court's seminal case, *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975), Board law and a General Counsel Advice Memorandum, support its contention that it had no obligation to provide the requested documentation prior to the investigative interview. Respondent contends that such law and opinion instruct that "a right to know the nature of the matter being investigated and to consult with a union representative prior to the investigative interview does not equate to a right to conduct discovery during the employer's investigation—before any action has been taken against the employee." (R. Br. at 7, 8–9.) Similarly, Respondent relies on the Supreme Court's acknowledgment in *Weingarten* that an employer has no duty to bargain with a union during an investigative interview.

I find that Respondent's reliance on *Weingarten*, other Board decisions and Board advice is misplaced.[8] The Court in *Weingarten* found that unionized employees have the right to request a union representative's presence at any investigatory interview that could reasonably result in disciplinary action. It also cautioned against permitting the "exercise of the right" to "interfere with legitimate employer prerogatives." The Supreme Court did not, however, speak to the issue of whether an employer may lawfully delay the furnishing of any and all relevant and necessary information, under all circumstances, prior to an employee's investigatory interview. It certainly did not require that the Union reinstate its request after the employer completed its investigation. The Court did confirm that a union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident in question. *Weingarten*, above, at 262–263.

Other cases cited by Respondent involve the now well-settled law that a union has a right to consult with its members prior to an investigative interview, but also do not address the issue of whether an employer has an obligation to provide a union with any relevant and necessary information prior to an investigative interview. Nevertheless, I find that most would support a

[8] Board advice, while instructive of the General Counsel's position, is not legal precedent, and therefore, I must follow current Board law unless or until it has been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

finding that an employer would have an obligation to do so under certain circumstances, including those involved in this case. In *Climax Molybdenum Co.,* 227 NLRB 1189, 1190 (1977), enfd. denied 584 F.2d 360 (10th Cir. 1978), the Board relied on the Supreme Court's opinion in *Weingarten* that to effectively represent an employee "too fearful or inarticulate to relate accurately the incident being investigated" a union representative must be "knowledgeable" to "assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident." Therefore, the Board determined that "these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts." Id. The Court of Appeals ultimately denied reinforcement in this case because the affected employees never expressed any interest in consulting with their union representative prior to the interview. However, as previously stated, the Court considered the specific facts in determining that a mining safety incident involving dangerous work activity and a physical altercation among employees created a special circumstance and compelling business justification "of conducting a smooth-running business operation." *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360, 362–364 (10th Cir. 1978).

The Ninth Circuit Court of Appeals has also enforced the Board's extension of an employee's right to consult with a union representative during a disciplinary interview to the right to counsel with them and obtain certain information prior to the interview. In *Pacific Telephone & Telephone Co. v. NLRB*, 711 F.2d 134, 136 (9th Cir. 1983), the court of appeals affirmed the Board's decision that the employer violated the Act by failing to inform the employees of the subject matter of the interview and granting them any pre-interview conferences with their union representatives. The court held that that:

> If the right to insist on concerted protection against possible adverse employer action encompasses union representation at interviews such as those here involved, then in our view the securing of information as to the subject matter of the interview and a pre-interview conference with a union representative are no less within the scope of that right. The Board's order that failure to provide such information and grant such pre-interview conferences constituted unfair labor practices is as permissible a construction of § 7 as was the construction upheld in *Weingarten.* Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished.

Id. at 136–137.

Therefore, I find that it is reasonable here, in light of the Board law above concerning the right of a union to request and receive relevant information in connection with grievances and potential grievances and the enforcement of the Board's holding in *Pacific Telephone*, above, to extend *Weingarten* to employees and/or their union representatives seeking pre-interview information concerning the charges leveled against the employee as long as such extension does not impede the investigation. Further, accepting Respondent's arguments and imposing a blanket prohibition against the right to receive relevant information prior to investigative interviews, especially those which most likely will result in discipline, would undermine the Union's right to carry out its duty to effectively represent its members in connection with

disciplinary and potential disciplinary actions. A union representative who must always wait until after discipline is issued to request and receive any information about charges rendered against its members is at a great disadvantage.

Respondent further asserts that the union representative's role at the investigatory interview is limited, citing the following cases: *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279–280 (1992) ("permissible extent of participation . . . is seen to lie somewhere between mandatory silence and adversarial confrontation"); *IBM Corp.*, 341 NLRB 1288, 1293 (2004) (Board declined to extend *Weingarten* rights to non-unionized employees and expressed concern about interfering with "an employer's ability to conduct an effective internal investigation.")[9] However, as described below, the facts in these cases are inapposite to those in this case and do not speak to pre-interview information requests.

In *New Jersey Bell Telephone*, the Board found that the union representative overstepped the rights set forth in *Weingarten* by interfering with legitimate employer "prerogatives" to compel employees to submit to questioning about alleged misconduct during the investigatory interview. The union agent in that case continuously interrupted the interview by repeating the questions asked of the employee, continuously objecting to and instructing the employee not to answer questions and essentially impeding the employer's right to conduct the interview. *New Jersey Bell Telephone Co.*, above at 279–280. In *Colgate-Palmolive Co.*, 257 NLRB 130 (1981), the Board rejected the respondent's arguments that the employees had not requested union consultation prior to the interview and that it had met its obligation by permitting the employees to privately meet with their representatives in the midst of the interview. In doing so, the Board refused to accept the respondent's general contention that the union "frequently advise[s] employees that they do not have to answer questions during investigatory interviews," and that "permitting preinterview consultation would violate the teachings of *Weingarten* by making the full disclosure of facts less likely, transforming interviews into adversary contests and interfering with the employer's legitimate prerogative to investigate misconduct dangerous to other employees." Id at 133. There is no evidence in the instant case that the Union had a history of attempting to counsel Barber or other members not to answer questions prior to or during such interviews or otherwise tried to thwart the Respondent's interview process.

Finally, I have read and considered the General Counsel's advice memorandum referenced in Respondent's brief. See *United States Postal Service*, 12–CA–24496 (Dec. 6, 2005). The General Counsel determined in that case that despite an inspector general's report being relevant, the Postal Service during its independent disciplinary investigation had a legitimate confidentiality concern that releasing it prior to the conclusion of the investigation would have been untimely and "could have" jeopardized the Postal Service's ongoing investigation. The memo stated that disclosure during the investigation would make it more difficult for management to assess credibility and could "compromise other investigative avenues available to the Postal Service." The General Counsel further concluded that the Postal Service's confidentiality interest during its investigation to ensure "fiscal integrity" where

[9] In *IBM Corp.*, above, the Board expressed concern that information not kept confidential may reduce the employer's opportunity of getting the truth and impede witnesses from coming forward. However, that case dealt with whether to extend *Weingarten* rights to non-unionized employees. *IBM Corp.*, supra, at 1293.

employees were suspected of theft outweighed the union's need for the report in preparing for *Weingarten* interviews. The General Counsel also found that the Postal Service had reasonably accommodated the Union when it provided it with the report within 3 days after the interviews were completed. However, in the cases cited in support of the memorandum, the Board evaluated whether the employer lawfully withheld information according to the facts in each one. For example, in *Postal Service*, 306 NLRB 474, 477 (1992), the Board decided that the Postal Service was justified in refusing to provide the union with names of confidential informants and audio and video of drug transactions because "disclosure might impair the ongoing investigations which may have begun as a result of the current investigation." In *IBM Corp.*, 341 NLRB 1288, discussed above, the Board voiced concern about interference in the employer's internal investigation, but in connection with its decision not to extend *Weingarten* to nonunion individuals. I find that in extending *Detroit Edison* to the facts in the instant case, the disclosure of the existing information prior to Barber's interview would not have compromised or jeopardized Respondent's investigation into her AWOL charges.

Even if Respondent's confidentiality concerns in this case were legitimate and substantial, I find that they should have been alleviated as of December 11. In any event, the Union had an equal or greater compelling need for the requested information: to prepare for potential discipline and the filing of a grievance.

C. Respondent's Unlawful Delay in Providing Relevant Information

The Board has long held that an employer must respond to an information request in a timely manner. See *Woodland Clinic*, 331 NLRB 735, 736 (2000). Thus, "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). See also *Finn Industries,* 314 NLRB 556, 558 (1994). In determining whether an employer has unlawfully delayed in furnishing information, the Board considers the totality of the circumstances. Therefore, "[w]hat is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Endo Painting Service*, 360 NLRB 485, 486 (2014), citing *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F. 3d 233 (4th Cir. 2005). Thus, the Board has found that a delay is unreasonable when the information requested is easily and readily accessible from an employer's files. See *United States Postal Service*, 365 NLRB No. 92 (2017); *Bundy Corp*., 292 NLRB 671, 672 (1989). The Board has also found that this analysis is an objective one; it does not turn on "whether the employer delayed in bad faith . . .but on whether it supplied the requested information in a reasonable time." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). In sum, an employer has a duty to timely furnish such information absent presentation of a valid defense. See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1 (1989), enfd. 943 F.2d 741 (7th Cir. 1991); *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377–-1378 (7th Cir. 1991), enf. 296 NLRB 715 (1989).

The Board has held that unjustified multi-month delays of 1.5 months to 3.5 months have been unlawful. See, e.g., *Management & Training Corp.*, 366 NLRB No. 134, slip op at 2, 4 (3.5-month delay); *United States Postal Service*, supra (6-week delay unreasonable where

information was readily available); *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part 432 F. 3d 69 (1st Cir. 2005) (3-month delay); *Woodland Clinic*, 331 NLRB 735, 736–737 (2000) (7-week delay); *United States Postal Service*, 308 NLRB 547, 551 (1992) (4-week unexplained delay unlawful where information was not difficult to retrieve); and *Bundy Corp.*, 292 NLRB 671 (2.5-month delay).

I find that Respondent violated the Act by delaying in furnishing the Union with certain of the requested information. Specifically, I find that providing the Union with the notice of absence forms signed on November 20 and 27 and subsequent leave analysis review signed on November 30 would have been well within the purview of the Act, Board law and even *Weingarten*, in that they would have explained the nature of the AWOL charges without compromising the investigation.

I find that Schuchaskie's December 3 response to Greathouse's November 29 request did not sufficiently explain the delay, state Respondent's confidentiality concern, ask for a narrowing of the information requested or propose a reasonable accommodation. In fact, Schuchaskie did not provide any real explanation for the delay until he sent the requested information to the Union via email on January 10, 2019, long after he initially consulted via email with Schaefer and Harcus and over a month after the Union filed its charge.[10] Nor did he give sufficient justification for the delay in his January 10, 2019 email with the attached information. The latter merely stated that "I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." (Jt. Exh. 3.) As previously noted, there was no requirement that the Union reinstate its request.

I reject Respondent's claim that Greathouse timely received all of the responsive information because he was present during Barber's interview. Even had Respondent provided requested information during its questioning of Barber, the Board in *Borgess Medical Center* found that a union does not have the burden of showing an ongoing need for the information. Instead, these facts as they exist at the time of the order on the merits must be considered in constructing the remedy for the violation. 342 NLRB at 1107. Further, Respondent's assertions that the Union was never entitled to other documents related to Barber's actual discipline because they had not yet been created, they were not "used in the interview," and were not responsive to the Union's November 29 request are without merit. I find that the Union's request on its face was not limited to the investigative interview questions, as it stated that, "[p]rior to the investigative interview . . . the APWU is requesting copies of all records and documents including [emphasis added] questions to get used in the interview." (Jt. Exh. 2.) Although the removal notice and interview questions may not have been created prior to the interview, other documents as set forth above had been created. I further find that Respondent's promise to furnish documents post investigation would have included Strahan's discipline recommendation which ultimately encompassed the removal notice issued to Barber on December 11.

I understand that Respondent does not normally send or copy the Union with notices of discipline; however, this situation was distinguished by the Union's presumptively relevant information request and Respondent's promise to furnish the information if it took disciplinary

[10] Greathouse was not privy to the internal email exchanges among Schuchaskie, Schaefer, and Harcus.

action against Barker. Although a grievance was not filed, under the circumstances, the Union would have had the opportunity to meet the filing deadline had Greathouse received the requested information.[11] I am not overlooking the fact that Barker did not read all of her mail and did not inform the Union when she received the December 11 removal notice. The evidence shows however that Greathouse did not discover the second notice until his January 4 meeting with Schaefer (regarding Barker's first and separate removal notice). (Tr. 62–63.) As stated, the investigative interview and resulting discipline here were not common place since they took place in the context of the Union's request for information and Barker's receipt of another removal notice only days before. According to the CBA provision set forth above, Greathouse arguably did not reasonably become aware of the facts giving rise to the grievance, i.e., the removal notice, until January 4. (Jt. Exh. 1, Art. 15, section 2 (a)). Nevertheless, the Union never waived or forfeited the right to the presumptively relevant information, nor did the request become moot after the investigative interview.

Therefore, I find that Respondent delayed in furnishing the Union with relevant and necessary information in violation of Section 8(a) (5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent, the United States Postal Service, and this case by virtue of Section 1209 of the Postal Reorganization Act (PRA).

2. Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unreasonably delaying in providing the Union with information as requested on November 29, 2018, and thereafter until January 10, 2019, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, having found that Respondent has engaged in unfair labor practices within the meaning of Section (a)(5) and (1) of the Act, it shall be ordered cease from unreasonably delaying in providing the Union with information relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's

[11] I note that the General Counsel did not request any remedy in connection with the Union missing the deadline for filing a grievance.

employees. Respondent will further be ordered to post and mail a notice to employees as attached as the Appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent, United States Postal Service, East Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unreasonably delaying in providing the Union, Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, with information, on request, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with information in a timely manner that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(b) Within 14 days after service by the Region, post at its facility in Eaton Rapids, Michigan copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 29, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 23, 2019

Donna N. Dawson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unreasonably delay, on request, in providing the Union, Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, with information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE responded to the Union's information requests from November 29, 2018, regarding a bargaining unit employee.

WE WILL, on request, furnish the Union in a timely manner with information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

UNITED STATES POSTAL SERVICE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-232299 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165.